



Software License Negotiations Support Proves Valuable

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Since the late 1990s, the Department of Defense (DoD) Enterprise Software Initiative (ESI) has supported the DoD services and agencies with Commercial off the Shelf (COTS) software licensing. DoD ESI awards and manages COTS ordering vehicles covering the software with the highest usage throughout the DoD. These ordering vehicles are utilized throughout the DoD and, with the co-branding of the Federal SmartBUY Program, DoD ESI support has extended to the entire Federal Government.

The ESI mission does not end with the award and management of ordering vehicles. DoD ESI is on the leading edge of trends in the software licensing world and the impacts they have on the Government. DoD ESI works closely with GSA and other agencies to address these software license issues to benefit the DoD IT buyer.

DoD ESI provides various methods of training on software licensing. These include: on-site classes, webinars, customized classes, and eLearning videos. DoD ESI also develops white papers, a Software Buyers Checklist and many other tools to further assist the DoD IT buyer in negotiating the best value for their commercial software license needs. All of these tools and assets are available on the DoD ESI website (www.esi.mil).

The Defense Federal Acquisition Regulation Supplement (DFARS) established the role of Software Product Managers (SPMs), the Government officials appointed by DoD ESI to manage enterprise software agreements. These software license experts are available via the “Ask an Expert” feature on the DoD ESI web site. DoD ESI also provides advisory support for the major DoD and Federal Software Enterprise License Agreements (ELAs) and individual organization’s COTS license requirements.

Negotiations Challenges

In some negotiations, it may feel that the commercial software companies are like NFL pros and the DoD IT buyer is the junior varsity. The software companies may have the DoD buyer on the defense or, even worse, in retreat or surrender. Many times these software companies have expert support behind the scenes working the negotiations. In face-to-face negotiations, publishers may field an entire offensive line while the DoD IT Buyer might be lucky to have two defensive ends. However, with the use of the DoD ESI advisory support team, you can level the playing field and face software vendors as a pro. Buyers who have used DoD ESI’s support during negotiations have seen positive results. For example, the team has helped identify and remove or modify language that is unclear, conflicting, or not in the best interest of the



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Government, and helped identify a technology solution that did not meet the Government's requirements.

It is not uncommon for the DoD ESI Subject Matter Expert (SME) to review hundreds of pages of licensing documentation. If all of these documents are not scrubbed and challenged, it can lead to poor and costly results for the Government. This article highlights just a few of the engagements where DoD ESI's input has been the difference between a good deal and a bad deal.

For the sake of privacy, we will not identify the DoD contracting activities, the end users or software vendors. Rather, we will highlight the process used to engage DoD ESI support as well as the potential impact of accepting what the software publisher originally presented to the buyer. We will also discuss the results of the strategy or revisions the DoD ESI support team proposed. Finally, for the purpose of this article, the term "buyer" means any Government official or team involved in a software acquisition and "software vendor" means the publisher or its authorized reseller.

The Engagement Process

When support is needed from DoD ESI SMEs, the following process should be followed to achieve the best results:

Step 1: The buyer requests support from DoD ESI via the "Ask an Expert" function on the DoD ESI web site or by contacting their assigned SPM or DoD ESI leadership.

Step 2: Based on the publisher and product being bought, DoD ESI assigns one or more software license SME(s) to the task.

Step 3: The DoD ESI SME and the buyer meet face-to-face or hold a web-based meeting or conference call to discuss the current situation and the buyer's requirements.

Step 4: The DoD ESI SME(s) will review the End User License Agreement (EULA), Terms and Conditions (T&Cs) and any other documentation presented to the buyer by the software vendor proposing the agreement. The SME will furnish, at a minimum, marked up or "red-lined" versions of the documentation that identifies inconsistencies, potential pitfalls, ambiguity, and terms and conditions that could cause the Government to bear unreasonable risk. In addition, any referenced or hyperlinked documents undergo the same level of scrutiny.

Step 5: The lead DoD ESI SME will collect, summarize and present the findings to the buyer and participate in a final, close-out discussion to ensure the buyer comprehends the findings and is prepared to enter into negotiations or discussions with the software vendor.



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Step 6: The DoD ESI SME remains available or “on call” to support the buyer throughout the entire negotiation process. This is because as the buyer presents the findings to the software vendor, the vendor may push back with additional documentation, markups, or counterpoints that must be evaluated.

Common Issues Found in Proposals and EULAs

Below is a brief sampling of issues commonly found in software license agreements proposed to the Government.

Termination

Many EULAs revealed termination language that conflicted with the requirement of the Federal Acquisition Regulation (FAR). If the language had been accepted as written, it would be disruptive to the government if the software vendor attempted to stop performing during a dispute.

Audit

Many documents contained language allowing audits by the software vendors, which is contrary to the DoD ESI’s recommended “self-audit” best practice. Some EULAs permitted audits more frequently than once a year. Another common issue was the requirement for the Government to pay for additional licenses at list prices in effect at the time of the audit findings. Not only does this put the government at risk for Anti-Deficiency violations or Unauthorized Commitments, but also commits the Government to pay an exorbitant price.

Third Party Software

SMEs have also identified unacceptable third party and open source software language. Such language could result in added expense and license compliance issues for the Government, such as requiring the Government to make available to the open source community all modifications made to the software.

Hyperlinks

Frequently, SMEs discovered links within the EULA or T&Cs that were broken or linked to additional terms and conditions that conflict with the EULA or T&Cs. Or, the links were to Web sites that could change often without the government’s consent. If the buyer had accepted the links as-is, the Government would have been at risk of ever-changing T&Cs that could have impacted the negotiated agreement or caused future compliance issues or additional costs.

Definitions



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The SMEs found that some defined terms were weak, missing, conflicting, or unclear. Terms that are not clearly defined and understood can undermine an entire contract and put the Government at greater risk.

Conflicting Terms

In one critical case, the SME found that conflicting and contrary terms could have put the Government at great risk. In one set of documents, the SME noticed one document stated transferability of licenses was granted but in another section they were restricted. Without the SME's support, the buyer would not have known which one should have taken precedence and the Government would be left without the guaranteed right to transfer licenses.

Maintenance

DoD ESI SMEs have found countless examples of risky language in maintenance agreements or clauses, such as EULAs that escalate the maintenance rate annually sometimes as much as 3-5% per year. Moreover, some EULAs granted the software vendor access to the Government's computers. Less alarming but no less critical, some maintenance agreements did not provide coverage during the Government's operating hours or even in the required spoken and written language.

Virtualization

SMEs have found this complex topic frequently absent or poorly defined in agreements or the software vendor's formulae were unclear or limiting. The SMEs showed the buyer how to negotiate clearer and more beneficial terms for software to be used and licenses counted in a virtualized environment.

Order of precedence

SMEs have assisted buyers so that Federal law and regulation trump the order of precedence proposed by the vendor. If the buyers had not challenged the software vendor in negotiations, many of the advantageous T&Cs secured by the Government could have been over-ridden if the software vendor's order of precedence was given priority.

Be Ready to Play Against the Pros

The issues presented above are just a few in which DoD ESI SME's have successfully assisted buyers in eliminating, modifying or addressing risky EULAs and T&Cs. DoD ESI SME support has assisted the Government in meeting their technical requirements while simultaneously protecting it from potential compliance issues and additional costs. Buyers using DoD ESI SME support report that they did not realize how many potential pitfalls there are in standard



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commercial EULAs and associated documentation. They also did not realize they could successfully negotiate many of these as part of a software contract. One buyer stated that by engaging the SME throughout the EULA negotiation process, he was successful in securing 90% of what the SME had recommended.

The buyer may not be successful in obtaining every SME-recommended change. However, by following DoD ESI's best practices and engaging its SMEs, the IT buyer will be meeting the software vendor on a level playing field, deploying a qualified and experienced squad against the software vendors.

For more information, please visit the ESI web site at www.esi.mil